STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE

In re: Michael Jinks
Asbestos Consultant-Project Monitor
License #000415

Petition No. 2003-0606-042-001
May 28, 2004

MEMORANDUM OF DECISION

Procedural History

On January 22, 2004, the Department of Public Health ("the Department") issued a Statement of Charges ("the Charges") against Michael Jinks ("respondent"), pursuant to *Conn. Gen. Stat.* §§19a-10 and 19a-14, seeking the imposition of disciplinary action against his asbestos consultant – project monitor license #000415 ("the license"). H.O. Exh. 1.

On February 24, 2004, the Department issued a Notice of Hearing in which the Commissioner of the Department appointed this Hearing Officer to rule on all motions, determine findings of fact and conclusions of law, and issue an order. H.O. Exh. 1.

On March 3, 2004, respondent filed an Answer, admitting some of the allegations in the Charges and denying others. H.O. Exh. 2.

On March 25, 2004, an administrative hearing was held to adjudicate the Charges. The hearing was conducted in accordance with Chapter 54 of the Connecticut General Statutes and §§19a-9-1, *et seq.* of the Regulations of Connecticut State Agencies ("the Regulations"). At the hearing, Attorney William McCoy represented respondent, and Attorney Mathew Antonetti represented the Department.

This Memorandum of Decision is based entirely on the record and sets forth this Hearing Officer's findings of fact, conclusions of law, and order. To the extent that the findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *SAS Inst., Inc. v. S & H Computer Systems, Inc.*, 605 F. Supp. 816 (Md. Tenn. 1985).

Allegations

1. In paragraph 1 of the Charges, the Department alleges that respondent is, and has been at all times referenced in the Charges, the holder of Connecticut asbestos consultant-project monitor license number 000415.

2. In paragraph 2 of the Charges, the Department alleges that on or about May 8, 2003, Mystic Air Quality Consultants, Inc. ("MAQC"), was the licensed asbestos consultant-

project monitor for an asbestos abatement project at Heritage Village Condominiums in Southbury, Connecticut ("the Property"). The asbestos abatement project involved the removal of approximately 106 square feet of asbestos containing sprayed on materials ("the project").

3. In paragraph 3 of the Charges, the Department alleges that respondent was the project monitor for MAQC who conducted a visual inspection and post abatement reoccupancey air clearance of the project at the property.

4. In paragraph 4 of the Charges, the Department alleges that on or about May 8, 2003, in connection with the project at the property, respondent:

   a. failed to conduct aggressive air sampling during the collection of post-abatement air samples, in violation of §19a-332a-12(c) of the Regulations; and,

   b. failed to ensure that the project was properly conducted and completed at the property, in violation of §20-440-3(b)(4)(A) of the Regulations.

5. In paragraph 5 of the Charges, the Department alleges that the above-described facts constitute grounds for disciplinary action pursuant to *Conn. Gen. Stat.* §§19a-332a and/or 20-440, taken in conjunction with §§19a-332a-12(c) and/or 20-440-3 of the Regulations.

Findings of Fact

1. Respondent is, and has been at all times referenced in the Charges, the holder of Connecticut asbestos consultant – project monitor license number 000415. H.O. Exh. 2 (the Answer).

2. At all times relevant to the Charges, respondent was an employee of MAQC. Dept. Exh. 1; Tr. pp.15, 18.

3. On May 8, 2003, Haz-Pros was the asbestos abatement contractor for the project, which involved the removal of approximately 106 square feet of asbestos containing sprayed on materials. H.O. Ex. 2; Dept. Exh. 1.

4. Haz-Pros contracted with MAQC to provide licensed asbestos consultant-project monitoring services for the project. H.O. Ex. 2; Dept. Exh. 1.

5. On May 8, 2003, respondent was the licensed project monitor for MAQC at the project. H.O. Exh. 2; Dept. Exh. 1.

6. On May 8, 2003, respondent conducted a visual inspection, and performed a post-abatement reoccupancy air clearance, of the project.[1] H.O. Exh. 3.

7. On May 8, 2003, employees of Haz-Pros encapsulated the abatement area at the property prior to respondent's visual inspection. Dept. Exh. 1; Tr. pp. 29, 80.

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[1] An asbestos abatement project cannot be reoccupied until a successful visual inspection and air clearance have been performed. *See,* §19a-332a-12 of the Regulations.

8. Respondent knew that Haz-Pros had applied encapsulant to the abated area prior to conducting his visual inspection. Tr. p. 114.

9. On May 8, 2003, respondent collected three sets of air samples in connection with the post-abatement reoccupancy air clearance he performed at the property. Dept. Exh. 1; Tr. pp. 45, 47, 87, 98, 108.

10. Respondent failed to perform aggressive air sampling prior to the first two sets of air samples he collected at the property, in that he failed to sweep the abated area with a leaf blower prior to collecting those air samples. Dept. Exh. 1; Tr. 125, 164, 181, 195, 227.

11. Respondent's failure to perform a visual inspection prior to the application of encapsulant to the abated area of the property posed a serious health threat to other workers at the site, the owners of the property, and the general public. Tr. pp. 203, 204, 210, 211.

12. Respondent's failure to perform aggressive air sampling of the abated area of the property posed a serious health threat to other workers at the site, the owners of the property, and the general public. Tr. pp. 124, 203, 204.

Discussion and Conclusions of Law

Pursuant to §20-440-6(b) of the Regulations, the Department may take any action authorized by *Conn. Gen. Stat.* §19a-17 against an asbestos project monitor who violates any regulation governing asbestos abatement or licensure. In establishing such violations, the Department bears the burden of proof by a preponderance of the evidence. *Swiller v. Comm'r. of Public Health*, CV-950705601, Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995; *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, reh'g den., 451 U.S. 933 (1981); *Bender v. Clark*, 744 F. 2d 1424 (10th Cir. 1984); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F. 2d 240, 243 (D.C. Cir. 1980); all as cited in *Bridgeport Ambulance Service, Inc., v. Connecticut Dept. of Health Services*, No. CV 88-0349673-S (Sup. Court, J.D. Hartford/New Britain at Hartford, July 6, 1989); *Swiller v. Commissioner of Public Health*, No. CV 95-0705601 (Sup. Court, J.D. Hartford/New Britain at Hartford, October 10, 1995).

The respondent admits paragraphs 1, 2, and 3 of the Charges. The Department, therefore, sustained its burden with regard to these paragraphs.[2]

With regard to paragraph 4a of the Charges, the evidence establishes that respondent

[2] Contrary to the allegation in paragraph 2 of the Charges, respondent was the licensed asbestos project monitor of the project at the property, and not MAQC. FF 5. However, since respondent was an employee of MAQC at the time, and since no charges have been brought against MAQC, this discrepancy is irrelevant to the underlying substantive violations alleged in the Charges.

performed a post-abatement air clearance of the project on May 8, 2003. FF 3. Section 19a-332a-12(c) of the Regulations requires that the air samples that comprise that air clearance "be collected using aggressive sampling as described in Appendix A of 40 CFR Part 763, subpart E to monitor air for post abatement reoccupancy after each asbestos abatement project." As part of that aggressive air sampling, Appendix A of 40 CFR Part 763, subpart E, requires that "prior to air monitoring, floors, ceiling and walls shall be swept with the exhaust of a minimum one (1) horsepower leaf blower."

Respondent collected three sets of air samples on May 8, 2003. FF 9. The Department claims that respondent failed to conduct aggressive air sampling in connection with the first two sets of air samples because he failed to sweep the abated area with a leaf blower prior to conducting those samples.[3] The Department also claims that during the inspection conducted by the Department on May 8, 2003, respondent admitted to the Department's investigator ("the investigator") that he didn't have a leaf blower with him that day. Dept. Exh. 1; Tr. pp. 125, 181, 195. At hearing, respondent denied this admission. Tr. p. 214. Both the Department and respondent agree that respondent failed to sweep the abated area with a leaf blower prior to his second set of samples, although respondent claims that he was not required to do so by the Regulations. Tr. pp. 89, 91. As discussed in greater detail below, respondent's claims are without merit.

Respondent was in the process of collecting his initial set of air samples when the investigator arrived at the site on May 8, 2003. Because respondent had not collected five samples as required by the Regulations,[4] the investigator instructed him to begin a new set of samples. Dept. Exh. 1; Tr. pp. 47, 87, 155, 161. After noticing that respondent failed to sweep the abated area with a leaf blower prior to commencing that second set of samples, the investigator asked him why he failed to do so. Respondent initially claimed that he was not required to sweep the area with a leaf blower before beginning his second set of samples because he already done so prior to commencing his first set of samples. Dept. Exh. 1; Tr. pp. 91, 164, 227. However, when the investigator asked him to produce the leaf blower he allegedly used to conduct his first set of aggressive air samples, respondent failed to do so. Dept. Exh. 1; Tr. pp. 124, 125. According to the investigator, respondent then admitted that he had no leaf blower and

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[3] The Department makes no claim that respondent failed to conduct aggressive air sampling in connection with the third, and final, set of samples he collected that day. Tr. p. 236.

[4] Project monitors are required by §19a-332a-12(g) of the Regulations to use five samples when collecting post-abatement air samples. Respondent claims he was in the process of borrowing two additional samples from Haz-Pros when he first came into contact with the investigator. Tr. p. 45.

that he had not swept the abated area prior to his first set of samples. Dept. Exh. 1. After obtaining this information from respondent, the investigator instructed him to leave the site to purchase a new leaf blower, and to conduct another, third, set of samples when he returned. Dept. Exh. 1; Tr. pp. 128, 194.

Respondent does not deny that he failed to produce a leaf blower when requested to do so by the investigator, or that he agreed to leave the site to purchase a new one. However, he now claims that he actually had a leaf blower in his truck that day. Tr. pp. 49, 92. According to respondent, he didn't produce his leaf blower because he thought the investigator was harassing him, and that if he produced the leaf blower it would only lead to further inquiries from the investigator. Tr. pp. 91, 92. He now also asserts that he mislead the investigator into believing that he was leaving the site to get a new leaf blower to get the investigator off of his back, and that he had no intention of purchasing a new leaf blower. Tr. pp. 93-94, 214, 230.

Respondent's story defies logic and his testimony lacked credibility. He makes no claim that the investigator's request to see the leaf blower was unreasonable, nor did he offer any evidence that the investigator was harassing him. It simply makes no sense that a professional licensed by the Department would implicitly admit to a regulatory violation (*i.e.*, by agreeing to leave the site to get a new leaf blower) simply to forestall additional inquiries from a Department staff person conducting a legitimate investigation. Either the respondent intentionally lied to and mislead the investigator when he agreed to leave the site to purchase a leaf blower on May 8, 2003, or he intentionally lied to and mislead this tribunal at hearing when he claimed to have had a leaf blower in his possession when he performed his first set of air samples. The preponderance of the evidence establishes that respondent misrepresented the facts at hearing, and that he did not have a leaf blower in his possession the morning of May 8, 2003.

As noted above, respondent admits that he failed to use a leaf blower before collecting his second set of samples. Even if he used one before his first set of samples, as he claims, his second set of samples would still have been invalid because of the length of time between the two set of samples.[5] Thus, respondent failed to conduct aggressive air samples in connection with the first two sets of air samples he collected on May 8, 2003. FF 10. The Department, therefore, sustained its burden with regard to paragraph 4a of the Charges.

With regard to paragraph 4b of the Charges, the evidence establishes that respondent performed a visual inspection of the project on May 8, 2003. FF 6. Section 19a-332a-7(c) of the

[5] Respondent began his initial set of samples to 11:00 a.m. He did not begin his second set of samples until approximately 11:40. Dept. Exh. 1.

Regulations requires that a "coating of encapsulant . . . be applied to all surfaces that have been stripped of ACM . . . *after* the surfaces have been visually inspected and found to be free of all visible residue." (emphasis added). Respondent does not dispute that Haz-Pros encapsulated the abated surface before he conducted his visual inspection. FF 8; *see also,* Tr. pp. 24, 126. He also acknowledges that he was aware that such encapsulant had been applied prior to beginning his visual inspection. FF 8. However, he argues that he was not required to ensure that Haz-Pros' employees complied with the above-cited regulation because of the limited nature of MAQC's contract with Haz-Pros. Tr. pp. 23, 229. Respondent also argues that the application of encapsulant by Haz-Pros prior to his visual inspection did not affect the reliability of that inspection. Respondent's claims are not persuasive.

Respondent admits that he was the project monitor at the property. FF 3. By definition, a project monitor "functions as an on-site representative of the facility owner . . . by over-seeing the activities of the asbestos abatement contractor." *See*, §20-440-1 of the Regulations. In addition, §20-440-3(b)(4)(A) of the Regulations authorizes project monitors to "monitor and evaluate contractor or employee compliance with applicable regulations or specifications and ensure that abatement projects are properly conducted and completed." Respondent offered no evidence that the scope of his duties as the project monitor at the property were limited or restricted in any matter. To the contrary, the letter from MAQC to Haz-Pros confirming the completion of respondent's duties at the project states that his services "were rendered in full accordance with the State of Connecticut Department of Health Services Standards for Asbestos Abatement, as found in the Regulations for Connecticut Sate Agencies Section 19a-332a-1 to 16." Dept. Exh. 1.

Respondent also argues that his visual inspection was still valid, despite its timing, because Haz-Pros applied a clear encapsulant to the abated area. Tr. p. 211. Respondent's argument misses the point. The regulations clearly require that visual inspections be performed prior to the application of encapsulent. The Regulations draw no distinction between the types of encapsulant to be applied. In addition, the preponderance of the evidence establishes that even clear encapsulent can interfere with a proper visual inspection.[6] Thus, respondent's failure to ensure that Haz-Pros applied encapsulant in the proper sequence directly impacted the reliability of his visual inspection.

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[6] Both the investigator and respondent agree that even clear encapsulant can mask asbestos fibers. Tr. 208, 210, 226.

As the project monitor at the project, it was respondent's responsibility to ensure that Haz-Pros did not apply encapsulant to the abated surface until after he performed his visual inspection. He failed to do so. The Department, therefore, sustained its burden with regard to paragraph 4b of the Charges.

On two occasions, respondent failed to employ aggressive air sampling prior to performing post-abatement reoccupancy air clearances at the property, as required by the Regulations. He also failed to ensure that the asbestos abatement contractor at the project encapsulated the abated area in the sequence established by the Regulations. These failures compromised the integrity of his post-abatement clearance of the project, and posed a potential health risk to other workers at the site, the owner of the property, and the general public. FF 11, 12. Accordingly, it is appropriate that the Department discipline his license as authorized by *Conn. Gen. Stat.* §19a-17 and §20-440-6(b) of the Regulations, as more fully set forth below.

Order

Based on the record in this case, the above Findings of Fact and Conclusions of Law, and pursuant to *Conn. Gen. Stat.* §§19a-17(a) and 20-440, and §20-440-6(b) of the Regulations, the following Order is hereby issued concerning respondent's asbestos consultant – project monitor license number 000415:

Civil Penalty:

1. Respondent shall pay a civil penalty of $2,000 by certified or cashier's check payable to "Treasurer, State of Connecticut." The check shall reference the Petition Number on its face, and shall be payable within thirty days of the effective date of this Order.

Reprimand:

2. Respondent's license number 000415 to practice as an asbestos consultant – project monitor in the State of Connecticut is hereby reprimanded.

Probation:

3. Respondent's license shall be placed on probation for sixty (60) days under the following terms and conditions:
   a. Commencing with the first Friday of his probation, and continuing on each successive Friday thereafter, respondent shall file a written report with the Department by 12:00 p.m. with the following information:
      (1) the address of each asbestos abatement project at which he will be performing the duties of a project monitor the coming week;

(2) the date(s) and time(s) he will be performing such duties; and,

(3) the name, and business address and phone number of the asbestos abatement contractor performing the asbestos abatement at each such project.

b. Commencing with the second Friday of his probation, and continuing bi-weekly thereafter, respondent shall ensure that a responsible managerial official of the firm, corporation, company, or person retaining his services as a licensed asbestos project monitor file a written report with the Department stating that respondent has performed his duties as a project monitor during the previous two week period in a professional manner, in compliance with all applicable statutes and regulations, and with reasonable skill and safety.

4. Respondent shall bear all costs associated with his compliance with this Order.

5. The civil penalty, and all notices and reports shall be sent to:

Ronald Skomro
State of Connecticut Department of Public Health
450 Capitol Avenue, MS #51AIR
P.O. Box 34038
Hartford, Connecticut 06134-0308

6. This Order shall be effective thirty days from the date of signature.

D. H. L.

Donald H. Levenson, Esq.
Hearing Officer

May 28, 2004
Date